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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 973

PIONEER MILL COMPANY, LIMITED (a Hawaiian corporation),
Petitioner-Appellant,

vs.

VICTORIA WARD, LTD., and VICTORIA KATHLEEN WARD,
and
Respondents-Appellees,

THOMAS DUNCAN (alias Thomas Cokett), ABRAHAM KELUKUMOKU KUKEA (alias Ephraim Kelukumoku Kukea), SOLOMON KAHOLOMOANI KUKEA, JOSEPH KALA KUKEA, JAMES KALEIWAHEA, ARTHUR KALEIWAHEA, LOUIS KALEIWAHEA, ELIZA KALEIWAHEA, VIOLET KALEIWAHEA, IRENE KALEIWAHEA, ROSALINE KALEIWAHEA, ALBERT JOSEPH KALEIWAHEA, TERRITORY OF HAWAII, COUNTY OF MAUI, FIRST DOE, SECOND DOE, and THIRD DOE, and all other persons although unknown, having or claiming to have any legal or equitable estate, right, title or interest of any nature in the land hereinafter described, or any part thereof, or any lien or claim with respect thereto. *Respondents.*

REPLY OF RESPONDENTS, VICTORIA WARD, LTD. AND VICTORIA KATHLEEN WARD, TO PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

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REPLY OF RESPONDENTS,
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TO PETITION FOR WRIT OF CERTIORARI
AND BRIEF IN SUPPORT THEREOF.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Victoria Ward, Ltd. and Victoria Kathleen Ward, named as respondents and appellees in the above entitled Petition, and hereinafter referred to as "respondents", respectfully show to the Court the following reasons for dismissing or denying the Petition for Writ of Ceriorari in this case:

SECTION I.

GROUNDS FOR DISMISSAL.

The Petition as filed does not comply with either Rule 38, Subdivision 5 (b) of this Court, or with Rule 38, Subdivision (2), which incorporates by reference Rule 12, Paragraph 1. Respondents specify the following defects in the Petition under said rules:

(1) The jurisdictional statement contained in Paragraph B, page 14 of the Petition embodies merely a statement of the date at which the decision of the Appellate Court was entered, the date at which the petition for a rehearing was denied, and the date at which the right to file a Petition for certiorari expired. Rule 12, Paragraph 1, of this Court, which is incorporated by reference in Rule 38, Paragraph 2, requires in part that the statement disclose the basis upon which it is contended that this Court has jurisdiction to review the judgment or decree in question, and as a part of said statement shall refer distinctly,

(a) to the statutory provision believed to sustain the jurisdiction;

(b) to the statute of the State or statute or treaty of the United States, the validity of which is involved; and also shall specify the stage in the proceedings of the Court of first instance, and in the Appellate Court in which the federal questions sought to be reviewed were raised, and the method of raising them, and the way in which they were passed upon by the Court, with quotations of specific portions of the record, including the rulings and assignments of error.

While in Rule 12 these matters are related solely to appeals from state Courts, under Rule 38, Paragraph 2, they are made applicable to proceedings for *certiorari* to all Courts.

The reason for the omission of these statements is quite plain upon the review of the record. Apart from the general constitutional authority of this Court to grant certiorari in any case if it desires to do so, there is nothing in the record which shows that the petitioner could comply with the rules which the Court has set up to govern its exercise of this authority. The validity of no statute of the Territory of Hawaii or of the United States is involved. The constitutional questions raised in the Petition for certiorari never were raised below except upon petition for a rehearing in the Circuit Court of Appeals. The Court will search the records and briefs in vain to find that the attention of the Supreme Court of Hawaii or of the Circuit Court of Appeals prior to the petition for a rehearing was ever directed by petitioner to any constitutional defects in the judgment either under the

Constitution of the United States or under the Territorial Act creating the Territory of Hawaii.

In *McCullough v. Kammerer Corporation,* 323 U. S. 327, 328, 89 L. Ed. 273, 274, this Court granted certiorari to the Ninth Circuit Court of Appeals to review an affirmance of a District Court judgment. Upon finding that the question upon which certiorari was granted had not been raised below, the Court said:

> "Thus the only question for which we granted certiorari is one not properly raised, litigated or passed upon below. * * * The grounds asserted for the allowance of certiorari are inadequately supported by the record, and the writ is therefore dismissed."

(2) The Petition does not show any conflict of decision between the Circuit Court of Appeals for the Ninth Circuit with any other decision of any other circuit in the same matter. It does not show that the Circuit Court of Appeals has decided an important question of local law in any way probably in conflict with the applicable local decisions; nor that it has decided an important question of federal law which has not been settled by this Court, or has decided any vital question in a way probably in conflict with parallel decisions of this Court. Indeed, one of the principal claims made in the Petition (p. 27) is that the Circuit Court erroneously *followed* the decision of this Court in the case of *Waialua Company v. Christian,* 305 U. S. 91, 109, 83 L. Ed. 60. This claim appears to be based on the novel contention that the Hawaiian Courts are really federal Courts because their judges are appointed by the President and not elected by the

citizens of Hawaii and that therefore the rule attaching great weight to the decision of a State Court of last resort in construing the statutes of its own State should not be applied to a territorial Court. But the Act of Congress creating the Territory of Hawaii (Act of April 30, 1900, Ch. 339, Sec. 80; 48 U. S. Code, Sec. 631) stated:

> "And until the *legislature* shall otherwise provide, the laws of *Hawaii* in force prior to April 30, 1900, concerning the several courts and their jurisdiction shall continue in force except as herein otherwise provided."

Thus it is clear that the territorial Courts derive their authority from the territorial legislature and not from Congress.

See, also,

Kealoha v. Castle, 210 U. S. 149, 154, 52 L. Ed. 998, 1001.

(3) The Petition does not show that the Circuit Court departed from the accepted and usual course of judicial proceedings or sanctioned such a departure by a lower Court to such an extent as would call for an exercise of this Court's power of supervision.

In *Magnum Import Company v. De Spoturno Coty,* 262 U. S. 159, 163, 67 L. Ed. 922, 924, this Court held:

> "* * * The jurisdiction to bring up cases by certiorari from the circuit courts of appeals was given for two purposes; first, to secure uniformity of decision between those courts in the nine circuits; and, second, to bring up cases involving questions of importance which it is in the public

> interest to have decided by this court of last resort. The jurisdiction was not conferred upon this court merely to give the defeated party in the circuit court of appeals another hearing. Our experience shows that 80 per cent of those who petition for certiorari do not appreciate these necessary limitations upon our issue of the writ."

(4) The Petition does not set forth any question under Rule 38, Paragraph 5 (c), which relates entirely to a construction or application of the Constitution, treaty, and statutes of the United States.

Upon the foregoing grounds we respectfully submit that the Petition should be dismissed.

SECTION II.

REPLY TO PETITION ON ITS MERITS.

1. PETITIONER'S SPECIFICATIONS NOS. 1 TO 7, INCL. (Petn. pp. 20-21.)

The Petition contains a long and involved statement of facts which we shall not presume to argue in this reply. The sum and substance of the petitioner's complaint is that it applied, as the undivided owner of certain real estate on the island of Maui in the Territory of Hawaii, for a decree of partition in kind between itself and the respondents; that on two separate trials the Hawaiian Territorial trial court awarded a decree of partition in kind; that upon two separate appeals the Supreme Court of Hawaii determined (R. 160, 280-289), as a mixed question of law and fact, that partition in kind was inequitable and

unfair to the respondents, and, in the latter decision, ordered in lieu thereof a sale of the jointly owned property and division of the proceeds. From the final decision of the Supreme Court of Hawaii, which incorporated by reference some of the holdings on its former decision (R. 289), the petitioner appealed to the Circuit Court of Appeals for the Ninth Circuit. That Court, after considering the voluminous briefs filed, determined that the only questions involved were those of local law in Hawaii and declined to interfere with the decision of the Territorial Supreme Court (R. 639-640), relying on the rule laid down by this Court in *Waialua v. Christian, supra.* (R. 639.)

In this situation petitioner asserts that the Circuit Court abandoned its functions and failed to rule on all of the points raised on appeal to the Territorial Supreme Court (Specifications Nos. 1 to 6, incl., Petn. p. 20), and that because that Court ordered a sale in the partition proceedings in lieu of the partition in kind which the petitioner asked for in invoking the proceedings, it is being deprived of its property without due process of law. (Specification No. 7, Petn. p. 21.) In other words, because the Supreme Court of Hawaii, in a case instituted by petitioner itself, refused to sanction a partition in kind which that Court thought would be inequitable to the respondents, and instead decreed that the property be sold and the proceeds divided, this constitutes a taking within the inhibition of the Fifth Amendment of the United States Constitution.

If petitioner's position is correct, then every litigant who instigates a law suit invoking a particular remedy would be entitled to raise a constitutional objection to a Court's decree if it denied the remedy sought or awarded a different remedy from the one that was sought. We think no citation of authority is necessary to demonstrate the absurdity of this contention.

2. WERE THERE ANY EQUITIES IN PETITIONER'S CASE WHICH JUSTIFY A REVIEW BY THIS COURT?

The principal objection made to the sale in partition is that the Supreme Court decreed that the sale value should include the value of certain improvements, namely, a water tunnel, certain buildings, and a railroad track constructed in and across the jointly owned property by the petitioner, and at petitioner's expense. (R. 305-6.) The Petition, however, significantly omits the basis for the ruling of the Supreme Court of Hawaii in this respect. We allude briefly to the record in this connection.

Petitioner entered into a written leasing agreement with the respondents and their predecessors in interest on August 31, 1896, for a term of twenty years, upon an agreed rental. This lease contained a covenant by the petitioner as lessee (R. 380), "that at the end or earlier determination of this term to peaceably quit and surrender the demised premises *with the improvements* to said Lessors or their representatives".

Upon expiration of this lease in 1916 petitioner continued in possession of the demised premises and continued to pay rent therefor from time to time.

(R. 458-465.) Petitioner without taking the trouble to acquire all of the undivided interests held by respondents in various subdivisions of the tract on which the petitioner was conducting a large sugar cane operation, went ahead and diverted all of the water from the stream which bordered some of these lands, through a tunnel which it built beneath the mountain range on Maui, and beneath some of the lands sought to be partitioned, and conducted the water to various portions of its holdings for irrigation purposes. It also built a railroad spur across some of the lands sought to be partitioned. (R. 78.) With the withdrawal of the water from the stream and consequent inability to irrigate many of the little riparian kuleanas upon which a number of the descendants of the original grantee of the property had dwelt, these tiny farms were abandoned as unfit for the taro growing which had constituted the previous native utility. (R. 614-615.) No consideration was paid any of the respondent land owners for this deprivation of water rights which, under the Hawaiian law, were originally appurtenant to all of these lands. The petitioner and its subsidiary corporation just took a chance that they could follow this course of procedure without interference from the persons who owned these lands.

The respondents, however, refused to acquiesce in any of these matters, and refused to sell their interests, in order to preserve a residuum of their ancestral inheritance. The lands in question had been originally granted in 1849 by King Kamehameha III to John Previer (R. 368), and that grant under the Hawaiian

law carried a water right with it. (R. 284.) Over the years it had passed into the hands of many descendants, some of whom had sold lots or undivided interests in lots to petitioner or its subsidiary, Lahaina Agricultural Company. (R. 153.) The respondents in the instant case refused to sell at prices offered. (R. 477.) Respondent Victoria Kathleen Ward, in opposing the partition proceedings, offered and demonstrated her ability to bid for the acquisition of all of the property that was subject to partition, in a desire to regain control of her ancestral estate. (R. 479, 487.) She was one of the descendants of John Previer, the original grantee. (R. 603-604.)

In this situation the question arises as to whether there is any equity in the petitioner's position. By its own contract it agreed that improvements made on the leasehold should belong to the lessor. This covenant in the lease was properly held by the Hawaiian Supreme Court to be a continuing enforceable covenant when petitioner held over and paid rent after expiration of the original term of the lease. That ruling was in conformity with the generally established and accepted rule that, in holding over, the tenancy is presumed to be subject to the terms, conditions and covenants of the original lease.

3 *Thompson, Real Property* (perm. ed.), Sec. 1034, p. 33;

2 *Taylor's Landlord and Tenant* (9th ed.), Sec. 525;

Jones, Landlord and Tenant, Sec. 202;

2 *Tiffany, Landlord and Tenant,* 1470-1471, 1479;

A. H. Fetting Mfg. Jewelry Co. v. Waltz, 160 Md. 50, 55, 152 Atl. 434, 435-436;
Peterson v. Dose, 124 Ore. 30, 33, 34, 263 Pac. 888, 889;
Brewer v. Kapp, 1 Pick. (Mass.) 332, 334;
Conway v. Starkweather, 1 Denio (N.Y.) 113, 115;
Wolffe v. Wolffe Bro., 69 Ala. 549, 553;
Schuyler v. Smith, 51 N. Y. 309, 313;
Prickett v. Ritter, 16 Ill. 96, 97;
Bacon v. Brown, 9 Conn. 334, 341.

The determination was also supported by at least one earlier decision of the Hawaiian Court.

Parke v. Robinson, 6 Haw. 666, 667.

The fact that the rental paid by petitioner was subsequently changed in 1926, long after the tunnel was built, did not alter the other obligations of the lease, including the Lessors' right to improvements on expiration of the lease.

3 *Thompson, Real Property* (perm. ed.), Sec. 1035, pp. 37, 38;
Cramer v. Baugher, 130 Md. 212, 215-216, 100 Atl. 507, 509.

Therefore, said the Supreme Court of Hawaii, in effect, even though the petitioner would have been equitably entitled to have set aside to it lands on which it had placed improvements if no other circumstances existed, the fact that it had used these improvements to deprive the respondents of their share of the waters of Honokowai stream, and the fact that it had origin-

ally agreed in writing that improvements placed on lands should belong to Lessors and had continued in possession of the lands under an implied extension of that covenant, changes the equities entirely. Respondents had an undivided interest in these improvements as a matter of contract. Two decrees of the trial Court deprived them of any title to or remuneration for the improvements and any restoration of water rights or compensation therefor.

In such circumstances, the Territorial Supreme Court held that the equitable rights of all of the parties could not be preserved by a partition in kind of the lands since much of the value of these parcels had been transferred to other properties of the petitioner through the diversion of water. Also, in view of the differences in fertility and accessibility of the separate parcels which the trial Courts had allocated to the respective co-owners, the Supreme Court found that justice to all parties would best be served by a sale and distribution of the proceeds. (R. 293.) Petitioner could buy the lands and improvements at the sale if it so desired; the fair value could be determined by competitive bidding; and in view of its ownership of seven-eighths of the title to the property it would only have to account to the ~~petitioner~~ Respondents and other undivided interest holders for one-eighth of the proceeds.

This Court held in *Waialua Agricultural Co. v. Christian,* 305 U. S. 91, 109, 83 L. Ed. 60, 72:

> "* * * In so far as the decisions of the Supreme Court of Hawaii are in conformity with the Con-

> stitution and applicable statutes of the United States and are not manifestly erroneous in their statement or application of governing principles, they are to be accepted as stating the law of the Territory. Unless there is clear departure from ordinary legal principles, the preference of a federal court as to the correct rule of general or local law should not be imposed upon Hawaii."

The suggestion in the Petition (p. 43) that the case just mentioned held that partition in kind should be made setting apart to a tenant in common the portion of the real estate innocently improved by him (headnote 8) is clearly inapplicable:

(1) because the Court merely used the rule as an illustration of what may be done to avoid inequities, no partition whatever being involved in that case;

(2) because the Hawaiian Supreme Court in the present case found several factual reasons why such procedure would be wholly inequitable.

Far from awarding the respondents a "nuisance value" for their holdings, as claimed by petitioner in Specification No. 9, the judgment appealed from merely holds with manifest justice that petitioner cannot ignore its contractual agreement that the improvements are a part of the realty, and convert a partition suit into an eminent domain proceeding for its private benefit. That in effect is what it has been trying to do throughout this long period of litigation.

SECTION III.

REPLY TO OTHER POINTS IN PETITION.

1. SPECIFICATION NO. 3. (PETN. p. 20.) FAILURE OF APPELLATE COURT TO EXAMINE THE FIRST DECREE OF THE SUPREME COURT OF HAWAII.

There was no need for a separate examination of the first decree because its essential rulings with respect to ownership of the improvements were incorporated in the final decree of the Supreme Court, which said (R. 289):

> "Hence, the petitioner's claim of title to improvements was settled by our opinion on the former appeal."

And again, on the same page:

> "We conclude that the decree as to water rights and title to the railroad tunnel rights of way, and ordering partition in kind, should be reversed and a decree entered by this court ordering a sale of the property and a division of the proceeds among the co-tenants according to their respective interests in the property."

The decree drawn pursuant to this opinion carries these instructions into effect. (R. 305-306.) Therefore, the Circuit Court of Appeals in examining the final decrees passed on all of the alleged errors in both decisions in the Supreme Court of Hawaii.

2. SPECIFICATION NO. 8. (PETN. p. 21.) HERE THE POINT IS RAISED THAT THE CIRCUIT COURT OF APPEALS ERRED IN NOT DECIDING THAT THE TRIAL COURT HAD JURISDICTION OF WATER RIGHTS APPURTENANT TO THE LAND, AND HAD CORRECTLY ADJUDICATED SUCH RIGHTS.

What the Supreme Court of Hawaii held (R. 286) was that although there were some one hundred and twenty kuleanas abutting on Honokowai stream below petitioner's diversion dam, some of those kuleanas were owned by persons not parties to the suit, and that such owners would not be bound by a decree between the parties purporting to settle the rights to the waters of Honokowai stream. The Supreme Court ordered (R. 286):

> "The decree purporting to settle the water rights is accordingly reversed, to the end that the issue be left open for adjudication in a proper proceeding, if such a proceeding should be instituted."

The decree of the Supreme Court from which the appeal is taken is entirely silent as to the ultimate disposal of water rights. Hence there is nothing before this Court to adjudicate under Specification No. 8.

3. SPECIFICATION NO. 10. (PETN. p. 22.) IT IS HERE ALLEGED THAT THE CIRCUIT COURT OF APPEALS ERRED IN HOLDING THAT THE QUESTION AS TO WHETHER THE PROPERTY IN THIS CASE COULD BE PARTITIONED IN KIND WAS A QUESTION OF LAW AND FACT.

This holding is alleged to be contrary to the decision of the same Circuit Court in *Manley v. Boone*, 159 Fed. 633 (C.C.A. 9—1908), involving an appeal from a par-

tition decree of the District Court of Alaska. An examination of that decision reveals that the questions there involved were entirely questions of fact, and the Appellate Court properly upheld the trial Court's findings on disputed evidence. In the case at bar, as heretofore pointed out, the legal questions as to the effect of petitioner's contractual agreement in the lease of 1896 and the hold-over tenancy thereafter that improvements should revert to the Lessors, the legal question as to the effect on values of the diversion of water from Honokowai stream without the authority of the owners entitled thereto—some of whom are respondents here—are all interwoven with the factual question as to the partibility or inpartibility of the land and improvements made thereon by the petitioner. Therefore there is no divergence by the Appellate Court from its prior rulings such as might justify a review by the United States Supreme Court. Furthermore, the Supreme Court of Hawaii is empowered by the laws of that Territory to review the entire record in equity cases and to make its own findings of fact.

Rev. Laws of Hawaii, 1945, Sec. 9505, provides as follows:

> "In case of appeal to the Supreme Court from a decision, judgment, order or decree of a circuit judge in chambers, the Supreme Court shall have power to review, reverse, affirm, amend, modify or remand for new hearing in chambers, such decision, judgment, order or decree in whole or in part, and as to any or all of the parties."

This section (which is identical with Sec. 3503, R. L. 1935) was interpreted by the Supreme Court of Hawaii as follows:

> "That this Court on an equity appeal will review the entire record before it and make its own findings of fact as well as rulings of law is authorized by Section 3503, R. L. 1935. (See *Estate of Isenberg,* 28 Haw. 590; *Bradbury v. Bradbury,* 29 Haw. 638; and *Wilder v. Pinkham,* 23 Haw. 571.)"
>
> *Mfgrs. Life Ins. Co. v. von Hamm-Young,* 34 Haw. 288, 303.

See also to like effect:

Wery v. Pacific Trust Co., 33 Haw. 701, 724;
Robinson v. McWayne, 35 Haw. 689, 739;
McCandless v. Castle, 25 Haw. 22, 23.

The other assignments raised by petitioner have been grouped and answered under Section II of this reply.

We conclude that the Supreme Court of Hawaii, acting under the authority of the local statutes, has correctly and conclusively decided certain questions of law and fact; that such decision has involved no manifest injustice to petitioner and certainly no judicial questions of great public importance; that the Circuit Court of Appeals has correctly refused to reverse the decision on questions of local law in Hawaii, and has correctly abided by the rule laid down by this Court in the *Waialua v. Christian* case, *supra;* that no constitutional questions are involved

and none were ever suggested by the petitioner prior to the filing of petition for rehearing in the Circuit Court of Appeals; that under these circumstances the Petition should be either dismissed or denied.

Dated, San Francisco, California,
February 10, 1947.

Respectfully submitted,
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